to its assistance to its former secured creditors without the latter's consent; for such an act would clearly impair the obligation of its contracts. And since the Constitution of the United States forbids a state to pass an act which would have such an effect, it is difficult to see how a court — which is only one branch of the government of a state — can have a power denied to the state itself. The practice has been defended on the ground that railroads are public in their nature and that the public would suffer great inconvenience and loss if these improvements were not undertaken.[6] But in reply it may be said — and the argument seems unanswerable — that the security of a debt is itself property, and the divesting of its priority for the benefit of the public is the taking of property for a public use for which the public should render compensation.[7]

It has been the almost universal rule of equity to distinguish between quasi-public and private corporations, and in the latter to allow the issue of certificates only for the purpose of maintaining and preserving the property. It is as indefensible in theory to divest vested rights without the lienholders' consent in public service corporations as in private corporations; and although on the authorities it is well settled that receivers of public service corporations have power to issue certificates for purposes other than the physical preservation of the property, a limitation on that power in private corporations should be looked on with approval. In a recent case, however, the New Jersey Chancery Court has extended this power to a point far beyond any that has yet been reached. *Lockport Felt Co.* v. *United Box Board and Paper Co.*, 70 Atl. 980. A receiver of an insolvent private corporation composed of eighteen mills obtained permission of the court to issue certificates to provide a fund for the paying of an installment of the bonded indebtedness of one of the mills which was subject to immediate foreclosure in case of default; such certificates to become a lien on all of the other mills prior to that of the subsisting mortgage. The court granted this authority on the ground that such a course was necessary for the preservation of the property. It is difficult to follow the reasoning which underlies such an extension of the general doctrine. "Preservation of property," as interpreted by the courts, has never meant preservation from the claims of a mortgagee, but preservation from physical destruction.[8]

DEPENDENT RELATIVE REVOCATION OF WILLS. — The doctrine of dependent relative revocation of wills is undoubtedly closely associated with the notion of a conditional revocation. It is difficult, however, to define its exact scope or to deduce from the authorities any satisfactory general principles by which the various classes of cases which have applied the doctrine may be reconciled. The decisions are not harmonious and the opinions are frequently misleading. But much of the confusion is unquestionably due to a failure by many courts to distinguish carefully between a conditional and an absolute revocation.

There may well be a true conditional revocation. A typical case is where a testator makes the destruction of his will depend for its operation upon the efficacy of an intended new disposition. It is clear that in such circum-

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[6] Meyer *v.* Johnston, *supra.*

[7] See dissenting opinion of Walker, J., in Humphreys *v.* Allen, 101 U. S. 490.

[8] Raht *v.* Attrill, 106 N. Y. 423; Farmers, etc., Trust Co. *v.* Coal Co., 50 Fed. 481; Hooper *v.* Central Trust Co., 81 Md. 559, 591.

stances, if the attempted disposition fails to take effect in the manner intended, the physical act of destruction is deprived of all revoking efficacy.[1] The condition upon which alone the revocation was intended to operate is unfulfilled and the *animus revocandi* essential to every valid revocation is, therefore, lacking.[2] On the other hand, the mere intention to make a new will in the future should not raise a presumption of a conditional revocation. The solution of each case turns upon the intent of the testator, and that, as a question of fact, is for the jury to determine.[3] A deliberate destruction *animo revocandi* clearly operates as a complete revocation, even though the testator also intends to execute a new will in the future, but fails to do so.[4]

A more difficult question arises in the case of revocations founded on mistake. Suppose, for example, that the testator destroys his will under the mistaken supposition that he has made another valid will. A recent English decision holds, in accordance with previous authority,[5] that the first will is not revoked. *Estate of Irvin*, 25 T. L. R. 41 (Prob. D., Nov. 2, 1908). And the same result has been reached where a testator strikes out,[6] or partially erases [7] the name of a legatee and substitutes the name of another, or increases [8] or reduces [9] the gift which he has previously made, without authenticating the changes by a new attestation in the presence of witnesses. In like manner, it is well settled that a will is not revoked by a subsequent will made under a mistake of fact.[10] On the other hand, a different result is reached by the courts where the revocation is founded on advice which turns out to be false. Such a revocation is not treated as conditional or dependent upon the soundness of the advice.[11] An exception is also made where the subsequent instrument contains a revoking clause, and a new disposition which is invalid. The rule in such cases appears to be that the revoking clause is not regarded as conditioned upon the efficacy of the disposing part and that the revocation should stand.[12]

The extension of the doctrine to revocations founded on mistake seems, however, open, both theoretically and practically, to serious objection. The theory upon which the courts proceed appears to be that the presence of the mistake prevents the *animus revocandi*.[13] But the fallacy in this view

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[1] Dixon *v.* The Solicitor to the Treasury, [1905] P. 42.

[2] *Cf.* Giles *v.* Warren, L. R. 2 P. & D. 401.

[3] See McIntyre *v.* McIntyre, 120 Ga. 67, 71.

[4] Semmes *v.* Semmes, 7 H. & J. (Md.) 388; Estate of Olmstead, 122 Cal. 224. But see Goods of Applebee, 1 Hagg. Eccl. 143.

[5] Scott *v.* Scott, 1 Sw. & Tr. 258; Dancer *v.* Crabb, L. R. 3 P. & D. 98; Wilbourn *v.* Shell, 59 Miss. 205.

[6] Wolf *v.* Bollinger, 62 Ill. 368.

[7] Goods of McCabe, L. R. 3 P. & D. 94.

[8] *In re* Knapen's Will, 75 Vt. 146.

[9] Locke *v.* James, 11 M. & W. 901; Soar *v.* Dolman, 3 Curt. Eccl. 121.

[10] Doe d. Evans *v.* Evans, 10 A. & E. 228; Campbell *v.* French, 3 Ves. Jr. 321. The conditions, however, which the testator assumed to exist, and the assumed existence of which induced the revocation, must appear on the face of the subsequent revocatory instrument. Skipwith *v.* Cabell, 19 Grat. (Va.) 758; Gifford *v.* Dyer, 2 R. I. 99. But see Goods of Moresby, 1 Hagg. Eccl. 378.

[11] Atty. Gen. *v* Lloyd, 1 Ves. Sr. 32. Revocation is also held to result where the facts are peculiarly within the knowledge of the testator. Mendinhall's Appeal, 124 Pa. 387; Hayes *v.* Hayes, 21 N. J. Eq. 265. But see *In re* Taylor's Estate, 22 Ch. D. 495.

[12] Price *v.* Maxwell, 28 Pa. 23; Hairston *v.* Hairston, 30 Miss. 276; Tupper *v.* Tupper, 1 K. & J. 665. Compare Quinn *v.* Butler, L. R. 6 Eq. 225, with Locke *v.* James, 11 M. & W. 901.

[13] See, for example, Locke *v.* James, *supra*.

is that it overlooks the distinction between incompleteness and completeness induced by mistake. The revocation in this class of cases is not in any sense conditional. The mistake simply operates as the inducement to the complete act of revocation and does not prevent its coming into being.[14] Equity, however, might well relieve against such a revocation where to do so would more nearly carry out the intention of the testator.[15] There would, moreover, seem to be no valid practical objection to the setting aside of the revocation by the probate courts provided the equitable basis of their action were recognized.[16] As it is, they have frequently unconsciously done the work of equity,[17] but the failure to make the above distinction has resulted in many decisions which seem to do violence to the intention of the testator.[18]

LIMITATIONS UPON THE SERVICE AND ENFORCEMENT OF SUBPŒNAS. — As a general rule, a subpœna may be taken out by any party to a suit without special leave of the court.[1] Originally defendants indicted for capital felonies were not included within this rule,[2] but by statutes they have generally been placed upon an equal footing with other parties.[3] The general rule is, however, subject to many limitations. Thus it is within the discretion of the court to refuse to allow an excessive number of witnesses to be summoned,[4] and where the defendant may subpœna witnesses at the state's expense, the courts generally require him to show that the desired witnesses will be able to give material evidence.[5] Moreover, the right to have subpœnas issued is broader than the right to compel attendance in obedience thereto. The right guaranteed by the Sixth Amendment and by various state statutes to have compulsory process for obtaining witnesses is limited to the right to have subpœnas served.[6] The theoretical basis for this view is that in the eighteenth century the practice of compelling attendance of witnesses by attachment was not well settled in England,[7] so that the right to have compulsory process, if strictly interpreted, then meant merely that the subpœnas should be served; and if they were not obeyed, the aggrieved party was left to his action for damages.[8] From a practical standpoint a subpœna may frequently be issued as a matter of course, whereas upon further information it would

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[14] *Cf.* Edmunds *v.* Merchants' Despatch, etc., Co., 135 Mass. 283.

[15] Onions *v.* Tyrer, 2 Vern. 742; Campbell *v.* French, 3 Ves. Jr. 321.

[16] *Cf.* in the law of sales where the courts in allowing the action of trover, Thurston *v.* Blanchard, 22 Pick. (Mass.) 18, or replevin, John V. Farwell Co. *v.* Hilton, 84 Fed. 293, against the fraudulent vendee of a chattel are really doing equitable work. The fraudulent vendee is a constructive trustee, and the allowance of the action is in essence nothing else than specific enforcement of his obligation to return the title wrongfully acquired by him.

[17] See Powell *v.* Powell, L. R. 1 P. & D. 209; Goods of McCabe, *supra.*

[18] The probate courts should face the question squarely, recognize that a revocation induced by mistake is not really conditional, and either refuse to do equitable work or disregard the revocation and revive the old will only where that result is clearly the intent of the testator.

[1] Raymond *v.* Tapson, 22 Ch. D. 430.

[2] See 2 Hawk. P. C., c. 46, § 165.

[3] See West *v.* Wisconsin, 1 Wis. 209.

[4] Butler *v.* State, 97 Ind. 378.

[5] Jenkins *v.* Florida, 31 Fla. 190. See State *v.* Graves, 13 Wash. 485.

[6] State *v.* Stewart, 117 La. 476.

[7] See Bowles *v.* Johnson, 1 W. Bl. 35.

[8] See argument of counsel in People *v.* Smith, 3 Wheeler Cr. Cas. (U. S. C. C.) 134 *et seq.*